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CONSECUTIVE SYSTEMS SDN BHD

v.

MAPAL DR KRESS KG & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
KAMALUDIN MD SAID JC
[CIVIL SUIT NO: S-22-139-2010]
21 AUGUST 2013

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CIVIL PROCEDURE: *Pleadings - Admission - Dispute whether plaintiff was appointed as defendant's agent - Plaintiff's pleading stating plaintiff to be exclusive consultant - Whether plaintiff bound by its own pleadings*

CIVIL PROCEDURE: *Pleadings - Damages - Claim for commission due - Whether court could award based on proof of actual commission due and owing*

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- Inherent jurisdiction of court - Rules of Court, O. 92 r. 4

COMPANY LAW: *Separate legal entity - Corporate veil - Whether company was incorporated merely as way to obviate legal proceedings*

CONTRACT: *Agency - Formation - Whether valid contract of agency existed*

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between parties - Whether defendant had breached agreement - Whether plaintiff entitled to loss of profits and outstanding commissions

CONTRACT: *Formation - Whether valid contract existed between parties - Whether plaintiff was validly appointed as defendant's agent - Whether*

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defendant breached agreement - Whether plaintiff entitled to loss of profits and outstanding commissions

The plaintiff was a supplier of cutting tools for Proton. The first defendant was a maker and supplier of cutting tools and the second defendant was its exclusive agent in Malaysia. The first and second

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defendants ('the defendants') had approached the plaintiff for assistance in penetrating the market in Proton and the parties agreed that the first defendant was to appoint the plaintiff as an exclusive consultant to promote and supply the first defendant's cutting tools. The first defendant was to give a price list to the plaintiff and the plaintiff then

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was to purchase the first defendant's products from the second defendant. The first defendant was to pay a commission to the plaintiff on a project basis. The plaintiff began selling the first defendant's products and cutting tools to Proton. However, subsequently the second defendant began selling and supplying the first defendant's products to

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Proton directly, disregarding the earlier agreement between the parties. The third defendant was then incorporated, whereby the shareholders consisted of the first defendant and the shareholders of the second defendant. The third defendant went on to supply the first defendant's

products to Proton. The plaintiff commenced this suit claiming that the defendants had breached the agreement between the parties by approaching Proton and offering to sell directly to Proton. The plaintiff claimed that through the correspondences and meeting between them there existed a contractual relation which entitled the plaintiff to distribute the first defendant's product to Proton. The plaintiff claimed for loss of profits and balance of outstanding commission which they would have obtained had they been able to conduct the sale of tools to Proton as per the agreement. The plaintiff argued that the incorporation of the third defendant was merely a way for the defendants to obviate legal obligations pursuant to the agreement. The defendants denied that there was an agency agreement. The issues that arose for determination were: (i) whether there was a valid agreement between the plaintiff and the defendants; (ii) whether the plaintiff was an agent for the defendants?; (iii) whether the defendants had breached the agreement; (iv) whether the third defendant was incorporated merely as a way for the defendants to obviate legal proceedings; and (v) whether the plaintiff was entitled to loss of profits and outstanding commission.

Held (allowing plaintiff's claim against first defendant):

(1) The plaintiff's pleading clearly stated that the plaintiff acted as exclusive consultant. Therefore, it was the plaintiff's own admission in the pleading that the plaintiff was acting as an 'exclusive consultant' on behalf of the first defendant in promoting the first defendant's products. Parties are bound by their own pleadings. Based on the pleadings, the issue whether there existed a valid and binding contract between the plaintiff and the first defendant and third defendant did not arise. The claim as an exclusive distributor was with the second defendant only as pleaded in the plaintiff's statement of claim. (paras 37, 38 & 39)

(2) There was no agreement between the second defendant and the plaintiff which gave an exclusive right to the plaintiff to distribute the first defendant's products to Proton. There was no valid and binding contract between the plaintiff and the defendants and the plaintiff was not an agent for the defendants. Thus, the issue whether the defendants had breached the contract did not arise. (paras 67, 85 & 92)

(3) The third defendant was a separate legal entity. The incorporation of the third defendant was not to eliminate the plaintiff. The plaintiff could not prove that the third defendant had the malicious intent against the plaintiff. Further, even if the defendants had the

malicious intent to encroach on the plaintiff's economic relationship with Proton, it was nothing to do with the third defendant. (paras 112 & 115)

(4) Since there was no contract between the plaintiff with the defendants and there was no breach of contract, it followed that, the issue of whether the plaintiff was entitled to special damages, exemplary damages or aggravated damages and loss of profit did not arise. The prayer for specific performance was also not maintainable. (paras 125 & 126)

(5) The plaintiff's position as executive consultant being paid on commission basis depending on the net sales of the first defendant's product sold to Proton remained valid and enforceable. The plaintiff as an executive consultant was entitled to be paid the commission as promised by the first defendant. (paras 129 & 130)

(6) The plaintiff's statement of claim alleged EUR 109,500 as commission promised by the first defendant. However, the allegation was made before proof of actual commission in court. Since the plaintiff had successfully proved the actual commission and the court was satisfied with the evidence before it, therefore, the commission of EUR 172,000 was the commission due and owing to the plaintiff. In any event O. 92 r. 4 of the Rules of Court 2012 allows the court in its inherent powers to make any order as may be necessary to prevent injustice. (para 146)

Case(s) referred to:

Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Sdn Bhd [2010] 1 LNS 206 HC ***(refd)***

Curvet Transport SA & Anor v. Shapadu Trans-System Sdn Bhd [1999] 1 LNS 126 HC ***(refd)***

Gentali (Malaysia) Sdn Bhd v. Kawasaki Sunrock Sdn Bhd [1997] 1 LNS 249 HC ***(refd)***

Hadley v. Baxendale [1843-60] All ER Rep 461 ***(not foll)***

Koh Siak Poo v. Sayang Plantation Bhd [2002] 1 CLJ 501 CA ***(refd)***

Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor [2011] 1 CLJ 491 CA ***(refd)***

Win Line (UK) Ltd v. Masterpart (Singapore) Pte Ltd [2000] 2 SLR 98 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 4(1), 7, 74(1)
Rules of Court 2012, O. 92 r. 4

For the plaintiff - M Indrani (Puteri with her); M/s Jamaluddin Ibrahim & Assocs
For the defendants - Anthony Kuan (S M Kam with him); M/s S M Kam & Assocs

Reported by Amutha Suppayah

JUDGMENT

Kamaludin Md Said JC:

Introduction

[1] The trial of this case was held on 30 January 2013, 26 February 2013, 27 February 2013, 11 March 2013, 13 March 2013, 20 March 2013, 9 April 2013, and 24 April 2013 and concluded on 22 May 2013.

[2] The documents used in the trial are marked as follows:

Bundle of pleadings -	A1
Additional bundle of pleadings -	A2
Bundle of documents -	B1, B2, B3A, B3B, B3C, B3D
Defendants' additional bundle of documents -	B4
Issues to be tried (plaintiff's version) -	C1
Issues to be tried (defendants' version) -	C2
Agreed facts -	D
Plaintiff's case summary -	E
First defendant's case summary -	F1
Second defendant's case summary -	F2
Third defendant's case summary -	F3

[3] The witnesses who testified on behalf of the plaintiff and defendants are as follows:

Plaintiff's witnesses

(i)	Arman bin Daud	SP1
(ii)	Jumali bin Changi	SP2
(iii)	Kamaruddin bin Abu Samah	SP3
(iv)	Syed Ahmad Zulfar bin Syed Abdullah	SP4
(v)	Alias bin Abdul Hamid	SP5
(vi)	Abu Yazed bin Bakar	SP6
(vii)	Nor Azman bin Siron	SP7

Defendants' witnesses

(i)	Raja Iskandar bin Raja Aminul Rashid	SD1
(ii)	Ruediger Langknecht	SD2
(iii)	Lim Chooi Teck	SD3
(iv)	James Tan Hong Lee	SD4
(v)	Andrew Ng Suh Thiam	SD5

Backgrounds

[4] The backgrounds of the case are as follows:

(i) The plaintiff was a supplier of cutting tools to Proton from 1997, and representing cutting tool manufacturer Sumitomo from Japan.

(ii) The first defendant was at all material times involved in the business of making and supplying cutting tools. The second defendant was at all material times the exclusive agent of the first defendant in Malaysia.

(iii) On or around 4 April 2000, the first and second defendants approached the plaintiff for assistance in penetrating the market in Proton. However, since the second defendant was the exclusive agent of the first defendant, the parties came up with the following arrangement, whereby it was agreed, *inter alia* that:

(a) The first defendant was to appoint the plaintiff as an exclusive consultant to promote and supply the first defendant's cutting tools;

(b) The second defendant was to enter into an agreement with the plaintiff for the plaintiff to promote and sell the first defendant's products to Proton only;

(c) The first defendant was to give a price list to the plaintiff and the plaintiff then was to purchase the first defendant's products from the second defendant;

(d) Any purchase orders from Proton to the plaintiff for the first defendant's products, the plaintiff was to issue a purchase order of the same to be sent to the second defendant and the second defendant was to obtain the products from the first defendant to be delivered to the plaintiff and later delivered to Proton; and

(e) The first defendant was to pay a commission to the plaintiff on a project basis.

(iv) On or around 6 August 2001, the parties held a meeting whereby it was further agreed upon that:

(a) The plaintiff would be responsible in liaising directly with Proton in respect of purchasing matters;

(b) The first defendant would be responsible in overseeing the setup of technical support, as well as updating Proton on any new technology and product developments;

(c) The second defendant would be responsible for providing technical support; and

(d) The plaintiff will be able to send direct enquiries to the Mapal Group. However, all offers/quotations from Mapal Group must be handed over to the second defendant to be forwarded to the plaintiff.

(v) Since then the plaintiff had promoted the first defendant's products and cutting tools to Proton, which led to Proton's turnkey contractor Danobat to purchase the first defendant's cutting tools for the first new cylinder head line machining, and eventually Proton Tanjung Malim purchased the first defendant's products from the plaintiff, beginning October 2003 for repeat orders.

(vi) On or around January 2004, the plaintiff had also successfully secured the second cylinder head line machining project ("the Makino project") to use the first defendant's products and cutting tools.

(vii) In March 2004, the plaintiff had been invited by Proton to attend a meeting and technical discussion in process failure mode effect analysis ("PFMEA") at the Makino factory in Japan.

(viii) In January 2005, the Makino project was installed in Proton Tanjung Malim plant.

(ix) On or around March 2005, the first and second defendants attended a meeting with the purchasing department of Proton. In the meeting the second defendant had informed Proton that the second defendant was the first defendant's exclusive agent in Malaysia.

(x) Upon knowledge of the said meeting, the plaintiff had confronted the first defendant and requested an explanation. The first defendant however responded by terminating the plaintiff's services.

(xi) Pursuant to the meeting between Proton and the first and second defendants, the second defendant began selling and supplying the first defendant's products to Proton directly, disregarding the earlier agreement between the parties.

(xii) The plaintiff however, was still receiving inquiries from Proton for the first defendant's products. The plaintiff then requested from the first defendant for the price list for the second cylinder head line, which was withheld by the second defendant.

(xiii) On or around May 2005, the plaintiff initiated legal proceedings against the first and second defendants for *inter alia*, breach of contract, but later in 2009, withdrew the suit with liberty to file afresh.

(xiv) On or around 1 October 2007, the third defendant was incorporated, whereby the shareholders consisted of the first defendant and the shareholders of the second defendant. The third defendant went on to supply the first defendant's products to Proton until to date.

The Plaintiff's Claims

[5] The plaintiff claims that the first and second defendants had breached the agreement between the parties by approaching Proton and offering to sell directly to Proton.

[6] The plaintiff also claims loss of profits and balance of outstanding commission which they would have obtained had they been able to conduct the sale of tools to Proton as per the agreement.

[7] The plaintiff also claims that the incorporation of the third defendant is merely a way for the first and second defendants to obviate legal obligations pursuant to the agreement.

[8] The plaintiff thus claims for:

(i) Loss of profits amounting to RM8,355,021.54 from the defendants;

(ii) Commission amounting to Euro 109,500 from the first defendant;

(iii) Special and aggravated damages to be assessed; and

(iv) Specific performance orders that the defendants are to sell/provide the first defendant's products to the plaintiff to be sold to Proton and not to be sold directly by the defendants.

The Defendants' Defence

[9] The defendants deny that there was an agency agreement, and that the plaintiff was not an agent of the first and/or second defendants.

[10] The second defendant alleges that the plaintiff did not fulfil certain terms and conditions, and thus the second defendant had no legal relations with the plaintiff.

Issues To Be Tried

[11] There are two versions on what issues are to be tried. The plaintiff's version is at document C1 and the defendants' version is at document C2.

[12] From the respective pleadings and facts revealed during the trial, the common issues to be tried in the opinion of court are as follows:

(a) Whether there was a valid and binding agreement between the plaintiff and the first and second defendants;

(b) Whether the plaintiff was an agent for the first and/or second defendants?;

(c) Whether the first and second defendants had breached the agreement;

(d) Whether the third defendant was incorporated merely as a way for the first and second defendants to obviate legal proceedings; and

(e) Whether the plaintiff is entitled to the RM8,355,021.54, for loss of profits, and the balance of EUR 109,500 for outstanding commission.

A **Issues**

Whether There Was A Valid And Binding Contract Between The Plaintiff And The First And Second Defendants?

Whether The Plaintiff Was An Agent For The First And/Or Second
B *Defendants?*

[13] I shall deal with these two issues together because it is my view that the issues are interrelated which called for a common determination whether a valid and binding contract exist between the first and second
C defendants which the plaintiff claims the contract exist and the defendants claim it does not exist but the plaintiff is merely a "dealer" and not an agent in supplying the first and second defendants products to Proton.

The Plaintiff's Submission

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[14] For the plaintiff, it is contended that there was a valid contract. She submitted that s. 4(1) of the Contracts Act 1950 states that "The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made." Therefore, the first and
E second defendants had made legitimate offers to the plaintiff to create business relations.

[15] On or around 4 April 2000, the first and second defendants had approached the plaintiff, and had requested assistance from the plaintiff to penetrate the market at Proton.

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[16] Pursuant to the meeting on 4 April 2000, the first and second defendants respectively wrote to the plaintiff, detailing the terms and conditions of the proposed arrangement.

[17] The first defendant had by way of their letter dated 27 April
G 2000 stated *inter alia*, that the plaintiff would act as their exclusive consultant at Proton Motors Co and that commission will be determined on a project basis. This was later confirmed in an agreement dated 29 April 2000.

H **[18]** The second defendant had by way of their letter dated 5 September 2000 laid out the terms of the agreement as follows:

(i) That all business transactions between Mapal Asa Tools (M) Sdn Bhd for Proton will be billed directly to Proton;

I (ii) That all quotations on Proton's tool requirements will be quoted by the first defendant to the plaintiff and copied to the second defendant;

(iii) That the plaintiff was to issue purchase orders to the second defendant with the actual price quoted by the first defendant;

(iv) That the second defendant would clear all cargo upon arrival from Germany, whereas freight and handling costs as well as tax would be claimed on the plaintiff; and

(v) The plaintiff's credit terms with the second defendant were 60 days.

[19] This was further confirmed by way of the second defendant's letter dated 9 July 2001, wherein the second defendant had "cordially invited Consecutive Systems Sdn Bhd to officially enter into an accord".

[20] At all material times, the correspondences from the first and second defendants were addressed and made out to the plaintiff. Therefore, the defendants' allegation through their witness' oral testimony that the offers were made to En Abu Yazed in his personal capacity was clearly erroneous.

[21] Thus, there was clearly an offer made from both the first and second defendants to the plaintiff, create a business relation, which had been communicated expressly to the plaintiff.

[22] The plaintiff also relied on s. 7 of the Contracts Act 1950 which states as follows:

> In order to convert a proposal into a promise, the acceptance must:-
>
> (a) be absolute and unqualified;
>
> (b) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted.

[23] Therefore, it was submitted that the plaintiff had unconditionally accepted the offers made by way of letters dated 1 May 2001 and 4 May 2001.

[24] By virtue of the plaintiff's acts in securing the Danobat project, the plaintiff had accepted the first and second defendants' offers.

[25] This is further supported by the fact that the plaintiff had issued purchase orders to the second defendant according to the price list from the first defendant, whereupon the second defendant obtained the products from the first defendant to be delivered to the plaintiff and later delivered to Proton.

[26] Thus, pursuant to the plaintiff's acceptance of the proposals from the first and second defendants, the proposal then are converted into promises, in line with the provision under s. 7 of the Contracts Act 1950.

[27] The Contracts Act 1950, s. 2(d) defines 'consideration' as:

> when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

[28] It was further submitted that the fact that the plaintiff has, in accordance with the promises made under the agreement, done the following:

(i) used their good standing and reputation with Proton to promote the first defendant's products to Proton;

(ii) issued a RM100,000 bank guarantee, which was accepted by the second defendant; and

(iii) waived their rights in representing Sumitomo to Proton in order to promote the first defendant's products to Proton instead.

[29] With all the elements of offer, acceptance and considerations as shown above, it is the plaintiff's case that the parties had at all material times, intended to create legal relations, by virtue of all the correspondences exchanged, as well as the meeting held on 6 August 2001.

[30] It is not disputed that each party had carried out their respective duties and responsibilities as laid out in P10. Therefore, the plaintiff submitted that by virtue of this fact, parties had demonstrated their intention to be bound by the agreement.

[31] In following the terms and conditions agreed upon, the parties had carried out the following:

(i) the plaintiff had approached Proton and had promoted the first defendant's tools;

(ii) the first defendant had issued the price list to the plaintiff to enable the plaintiff to quote the prices of the products to Proton;

(iii) the plaintiff had issued purchase orders to the second defendant upon receipt of purchase orders from Proton for the first defendant's products; and

(iv) the first defendant had paid to the plaintiff commission for the sale of the first defendant's products for the first cylinder headline.

[32] The plaintiff submitted that all parties had in fact acted upon the agreements and understandings made between the parties, specifically in respect of:

(i) the responsibilities and job scopes of each party;

(ii) the modes and procedures of ordering and payments of the first defendant's tools; and

(iii) the commission promised and paid to the plaintiff.

[33] This was acknowledged and reaffirmed by the first defendant in their letter, wherein it was stated as follows:

> We confirm again you are the responsible Mapal dealer for the Proton project. All orders for repeat parts will be handled through you ...

[34] Thus, the plaintiff submitted that, taking into consideration the entire correspondences exchanged between the parties, as well as the conduct and execution of responsibilities by each party according to the arrangement laid down, there was in fact, a valid and binding contract.

The Defendants' Submission

[35] For the second defendant in their pleadings they alleged that there was never an agency agreement between the plaintiff and the second defendant, and thus they are not breaching any agreement.

[36] Plaintiff's pleading as it appears at paras. 23 and 25 of the amended statement of claim in A2 states that plaintiff is an exclusive consultant.

[37] Therefore, it is the plaintiff own admission in the pleading that the plaintiff is acting as an 'exclusive consultant' on behalf of the first defendant in promoting the first defendant's products and first defendant is an exclusive distributor for the second defendant.

[38] It is trite law that parties are bound by their own pleadings. The case of *Koh Siak Poo v. Sayang Plantation Bhd* [2002] 1 CLJ 501; [2002] 1 MLJ 65 is referred to where it was held that the parties must confine their case within the perimeter of their pleadings.

[39] Based on the pleadings filed herein, the issue whether there exist a valid and binding contract between the plaintiff and the first defendant and third defendant does not arise. The claim as an exclusive distributor is with the second defendant only as pleaded in the plaintiff's statement of claim.

[40] The defendants submitted that SD3 in his evidence had stated that the plaintiff was not appointed as their "business associates and agent" because the plaintiff has failed to fulfilled the 'conditions' as required by the second defendant in exh. D37.

[41] It was submitted that exh. P7 which invited the plaintiff as 'associates and agent' to the second defendant is subject to terms and conditions stipulated in that exh. P7.

[42] Therefore, the plaintiff's claim as an exclusive agent to the second defendant is without basis and not supported by any direct or conclusive evidence. Further, there is no formal contract or agreement entered into between the second defendant and the plaintiff.

[43] Mr Lim Chooi Teck (SD3) in his evidence stated that there are two proposals made to the plaintiff for mutual cooperation as stated in exh. D37. The proposals are as follows:

(a) The plaintiff will provide a bank guarantee for the sum of RM700,000 to the second defendant if the plaintiff wanted to work together with the second defendant; and

(b) En Abu Yazed will be appointed as director in the second defendant's company (Asa Tools) and the entire purchase by Proton will be paid commission in the form of consultation fees.

[44] The proposals were never responded by the plaintiff, therefore it was submitted that there is no contractual relations that exist between the plaintiff and the second defendant.

[45] It was further submitted that the proposals does not stipulate that the plaintiff will be appointed as an exclusive distributor for the second defendant. Based on the evidence, the issue whether the plaintiff has an agency contract/exclusive distributor with the second defendant does not arise and categorically disputed.

[46] In addition, in exh. D51, DW3 in his evidence stated that Consecutives System Sdn Bhd (plaintiff) did not give any response to the second defendant even after the dateline expired at the end of 2002. The second defendant reiterated his stand that there is no contractual relation between the plaintiff and the second defendant.

[47] Further, it was submitted, the fact that the plaintiff continue to receive the 'invitation to quote' price from Proton, as stated by Abu Yazed (SP6) during examination in chief, this does mean that the plaintiff is an agent to the second defendant considering the position and ability of Proton to issue 'invitation to quote' to any party.

[48] It was also submitted that the claim for commission against the first defendant is without basis because documentary evidence ie, exh. 'P5' shows the appointment as exclusive consultant is made to Abu Yazed and not the plaintiff (Consecutive System Sdn Bhd) in this action.

[49] SD2, Mr Rüdiger Langknecht from Germany representing the first defendant gave evidence that the said appointment is made to Abu Yazed B Bakar and not the plaintiff.

[50] It was further supported by other witnesses during trial that Abu Yazed introduced himself as consultant in promoting the first defendant's products.

[51] Therefore, the defendant submitted that the plaintiff's claim is without basis and not proven on the balance of probabilities.

Findings Of The Court

[52] The defendants seem to have the impression that the documentary evidence ie, exh. 'P5' shows the appointment as exclusive consultant is made to Abu Yazed and not the plaintiff (Consecutive System Sdn Bhd). With due respect, this contention is without merit because exh. 'P5' itself on the face of it was addressed to Consecutive System Sdn Bhd and Abu Yazed B Abu Bakar, the Managing Director. Exhibit 'P5' says Abu Yazed B Abu Bakar will be acting as first defendant exclusive consultant for Proton Motors Co in Malaysia. Since exh. 'P5' was addressed to Abu Yazed as Managing Director of Consecutive System Sdn Bhd, it is my view that the appointment of Abu Yazed is not in his personal capacity but as Managing Director of the company. Therefore this suit is correctly brought by the company instead of Abu Yazed personally.

[53] Exhibit 'P5' was sent to the company's address in Sungai Petani Kedah which is consistent with the address stated at para. 1 of the plaintiff statement of claim. In fact, most of the exhibits referred to by both parties and used in this trial are addressed to Consecutive System Sdn Bhd for the attention of Abu Yazed. Therefore, in this case, it is my view that any reference made in the correspondences in the name of Abu Yazed, must be understood as referring to the plaintiff and *vice versa* Abu Yazed as the Managing Director of the plaintiff.

[54] The second defendant alleges in their pleadings that there was never an agency agreement between the plaintiff and the second defendant.

[55] As correctly pointed out by the defendants that the plaintiff's pleading as it appears at paras. 23 and 25 of the amended statement of claim clearly stated that the plaintiff acted on his capacity as exclusive consultant. It is also the plaintiff's own pleading that he had attended meeting and technical discussion with 'turnkey' contractor Makino in Japan on 1 March 2004 to 5 March 2004 with the officers from Proton. It is further pleaded that in October 2004, on the invitation of Proton, the plaintiff as exclusive consultant and exclusive distributor (Proton) second defendant visited the "turnkey" contractor Makino in Japan for the final test on the entire project ('second new cylinder head line machine').

[56] In the plaintiff submission, the plaintiff claims that the second defendant's letters dated 6 September 2000, 9 July 2001(P7), the plaintiff's letters dated 1 May 2001 and 4 May 2001 and the meeting held on 6 August 2001 laid out the terms of the agreement which according to the plaintiff has been complied with and acted upon with due diligence. The fact that the plaintiff had, in accordance with the promises made under the agreement, used their good standing and reputation with Proton to promote the first defendant's products to Proton; issued a RM100,000 bank guarantee, which was accepted by the second defendant and waived their rights in representing Sumitomo to Proton in order to promote the first defendant's products to Proton instead have constituted elements of offer, acceptance and considerations. Thus, it is the plaintiff's case that the parties had at all material times, intended to create legal relations elements and that the plaintiff was the business partner/agent for the second defendant.

[57] In the submission in reply to the defendants submission, plaintiff's counsel then submitted that the plaintiff had not claimed to be an agent for the first defendant. The plaintiff's claims had at all material times revolved around the arranged agreement as laid out in the correspondences exchanged between the parties, which are marked as exhs. P4, P5, P6, P7, P8, P9 and P10.

[58] The sum of the said correspondences basically shows that the parties clearly had intentions to be bound by an agreement in respect of selling the first defendant's products to Proton.

[59] The case of *Curvet Transport SA & Anor v. Shapadu Trans-System Sdn Bhd* [1999] 1 LNS 126, was referred whereby the learned judge held as follows:

> It is pertinent to note that the negotiations between the parties were never on a 'subject to contract' basis. In other words, even though no formal contract was ever executed between the parties, this does not in law preclude the coming into existence of a valid and binding contract between the parties. All the material terms and conditions of the contract of carriage had been agreed upon, most importantly, the freight rate of US$1.8m had been agreed on the morning of 12 September 1997.

[60] It was submitted that based on the abovementioned case, it is clear that when parties have agreed upon the terms and conditions by which they wish to be bound by, a formal written contract is not necessary for there to be a valid and binding contract between them.

[61] It is upon this premise that the plaintiff has initiated his claim against the defendants, in that there exists a valid contract between the plaintiff and the first and second defendants governing their dealings with Proton in respect of the first defendant's products.

[62] The basis of this arrangement between the parties was that in selling the first defendant's products to Proton, the products are to be sold exclusively by the plaintiff. According to plaintiff counsel this can be seen in exh. P14, whereby the letter from the first defendant to the second defendant had stated this arrangement clearly, and that it was agreed by DW2.

[63] It was further submitted that the plaintiff and first and second defendants had at all material times intended for the plaintiff to be the sole distributor for the first defendant's products in respect of Proton. She referred to the case of *Gentali (M) Sdn Bhd v. Kawasaki Sunrock Sdn Bhd* [1997] 1 LNS 249 whereby the learned judge held as follows:

> In any case, even if there was no such express term, such a term should be implied. The implication of a term into a contract depends on the presumed intention of the parties. This intention may be collected from the express words of the contract and the surrounding circumstances, or from the nature of the legal relationship into which the parties have entered.

[64] Thus, it was concluded that there can be no issue as to whether there exists such a contract as parties not only had repeatedly clarified and agreed upon the terms, but each party had conducted themselves accordingly.

[65] In this instance case, it is not disputed that the second defendant is the exclusive agent of the first defendant, the first defendant is the manufacturer and the exclusive distributor of cutting tools machine used by Proton and the plaintiff was appointed as an exclusive consultant at Proton Motors Co.

[66] The plaintiff seems to have the impression that through the correspondences and meeting between them, there exists a contractual relation which entitled the plaintiff to distribute the first defendant's product to Proton. In other words the plaintiff's case is that the first and second defendants had at all material times intended for the plaintiff to be the sole distributor for the first defendant's products in respect of Proton. Such contract has been breached by the first and second defendant when they set up the third defendant as a local company to supply or distribute the first defendant's product direct to Proton.

[67] In the first place, there is no written or formal agreement between the first defendant, second defendant and the plaintiff detailing the express terms and conditions of the business arrangements. Secondly the second defendant was to enter into an agreement with the plaintiff for the plaintiff to promote and sell the first defendant's products to Proton only. At the end of the case, I did not find the supposedly agreement between the second defendant and the plaintiff which gives an exclusive right to the plaintiff to distribute the first defendant's products to Proton. Hence, the earlier arrangement that the first defendant was to appoint the plaintiff as an exclusive consultant to promote and supply the first defendant's cutting tools is the well-known and accepted facts.

[68] Perusing exh. P4 dated 27 April 2000, what is said therein is that first defendant got the approval from the second defendant regarding the plaintiff position. The first defendant decided to appoint the plaintiff as their exclusive consultant at Proton Motor Co which will be confirmed separately in a special agreement. The plaintiff will be paid commission for each project separately, depending on the actual net sales price less the charges incurred for shipment and packing. The plaintiff will receive a complete Mapal catalogue so that they will be able to represent the first and the second defendant at Proton.

[69] The plaintiff's position in P4 is clearly spelt out as an exclusive consultant with payment of commission for each project separately. This appointment as exclusive consultant was later confirmed in exh. P5. The defendants did not dispute the existence of this documentary evidence ie, exh. 'P5' which shows the appointment as exclusive consultant is made to the plaintiff.

[70] It is not disputed that the second defendant being the principal agent of first defendant will import the products from the first defendant. It is not disputed that the plaintiff's supply of the products to Proton will depend wholly on the second defendant being the exclusive agent to the first defendant's product in Germany.

[71] The letter dated 6 September 2000 which the plaintiff strongly relied on as proof that a legal relation is created in my mind, must be read carefully in its proper context and purpose. Perusal of this letter, it says that the second defendant welcome the plaintiff as business partner for "Proton" Malaysia. As agreed all business transaction between Mapal Asa Tools (M) Sdn Bhd for Proton Malaysia the plaintiff will bill directly to Proton subject to terms and conditions. The second last paragraph, it says that the sales and purchase agreement between the second defendant and the plaintiff will be made and a copy of the agreement will be forwarded to the first defendant. At the last paragraph it further says that the terms and conditions given to the plaintiff will give an idea how the transaction will carry on.

[72] From the reading of this letter, it is my opinion that the terms and conditions are subject to an agreement to be made and to be approved by the first defendant. The agreement is in respect of sales and purchase agreement. It does not say that it is in respect of an agency/distributor agreement. There is nothing in that letter to say expressly whether the plaintiff should accept or to reject the proposal. Therefore, it is not an offer but a proposal to the plaintiff of an idea how the transaction will carry on and is consistent with the intention of the first defendant and for his approval.

[73] In order to convert a proposal into a promise, the proposal must prescribe the manner in which it is to be accepted. The letter dated 6 September 2000 does not prescribe such manner. Therefore, it is my opinion that the plaintiff's counsel contention that this letter constitutes an offer is not true or does not hold water.

[74] The plaintiff had responded in letters dated 1 May 2001 and 4 May 2001 to the second defendant's letter dated 6 September 2000. However, since I have found that the letter does not constitute an offer, therefore the plaintiff's contention that the plaintiff's letters 1 May 2001 and 4 May 2001, tantamount to acceptance is also not correct.

[75] Plaintiff was invited to officially enter into an accord with the second defendant which was supposed to take place on 30 July 2001 to coincide with Mr Ruediger Langknecht of the first defendant visit to Kuala Lumpur. This initation is found in the second defendant's letter

dated 9 July 2001 (P7), which the plaintiff is also relying and contains the renewed term that credit terms of 60 days was offered and shall be validate with letter of bank guarantee.

[76] From this letter, it is my understanding that all the terms and conditions of the sales and purchase agreement must be made in writing in the presence of, or the first defendant as the manufacturer and the exclusive distributor of cutting tools machine used by Proton. However the agreement was never concluded and materialised.

[77] The letter from first defendant's Asia Office dated 6 August 2001, which the plaintiff is also relying and claims as proof of intention to create legal relation, in effect contains the consensus reached in the meeting between Abu Yazed, directors of second defendant's and Mr Langknecht of the first defendant company whereby, the role of the plaintiff and the second defendant had been clearly stated.

[78] In that meeting it was agreed that the plaintiff will be responsible for liaising with personnel from Proton with regards to future receiving of orders and follow up support and the second defendant main responsibilities will be providing technical support as and when required by the customer Proton. For future conduct of business, it was agreed upon that the plaintiff will be able to send in direct enquiries to first defendant. It is however that all those offers/quotation from the first defendant must be handed over to the second defendant which in turn will forward these offers to the plaintiff and the offers will still have the plaintiff's name as the addressee.

[79] By that meeting and with the first defendant having in control of the position on how both the plaintiff and second defendant will work together to deal with the first defendant's product and business, my conclusion is that the earlier arrangement made in letter dated 6 September 2000[46] and the follow up in letter dated 9 July 2001 (P7) has not materialised.

[80] The letter from first defendant's Asia Office dated 15 November 2002 (D37) contains further consensus reached in the meeting between Abu Yazed, directors of second defendant's and Mr Langknecht of the first defendant company whereby two proposals were discussed for future co-operation. All agree that the proposal must be very transparent in order for both parties to work together.

Proposal 1
All goods will be consigned to Asa Tools Sdn Bhd.
Asa Tools will handle the freight, pay the duty and tax.

Consecutive System must pay up the freight, duty and tax to Asa Tools before delivery to Proton.
Asa Tools will give term of 60 days to Consecutive Systems is able to give a bank guarantee of RM700,000.

Proposal 2
Asa Tools to appoint Mr Abu Yazed as a Director.
Asa Tools will then invoice directly to Proton.
Mr Abu Yazed will receive/sign all invoices to Proton.
When Proton pays the invoice, Asa Tools will then pay Mr Abu Yazed his profit in the form of consultation fee.

Based on these two proposals, both Asa Tools and Consecutive System will make a final decision by 31 December 2002.

[81] The proposals were never responded by the plaintiff. By letter dated 30 December 2002 (D51), the plaintiff was reminded about the dateline. Despite the reminder in D51, there was no reply from the plaintiff.

[82] Since the term for future co-operation mentioned in Proposal 1 in D37 (15 November 2002) which comes under paragraph of terms and condition is the same term of future conduct of business agreed in meeting found in first defendant's Asia Office letter dated 6 August 2001, it is my conclusion that this term has not been finalised.

[83] By the plaintiff failing to respon to the two proposals agreed during the meeting to which the plaintiff was also present, my conclusion is that there is no acceptance to the proposals. The plaintiff had abandoned the agreement with regards for future cooperation. Therefore the plaintiff's counsel submission that all the elements of offer, acceptance and considerations that the parties had at all material times, intended to create legal relations, by virtue of all the correspondences exchanged, as well as the meeting held on 6 August 2001 is not correct.

[84] In order to convert a proposal into a promise, the acceptance must be absolute and unqualified and be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted.

[85] My conclusion on whether there was a valid and binding contract between the plaintiff and the first and second defendants and/or whether the plaintiff was an agent for the first and/or second defendants are answered in the negative.

A *Whether The First And Second Defendants Had Breached The Contract*

[86] It was contended that there was an acknowledgment and reaffirmation by the first defendant in their letter that the plaintiff is the responsible Mapal dealer for the Proton project. And all orders for repeat parts will be handled through the plaintiff, and again it is the plaintiff's contention that this acknowledgment tantamount to appointment of the plaintiff as exclusive dealer having direct dealing with Proton which term have been breached.

[87] However, in my opinion, this contention is not correct. The above matter was actually clarified and corrected in the letter dated 30 November 2004 (P14) by the first defendant that the procedure for repeat enquiries and repeat orders with reference to Proton it was agreed to offer Mapal products exclusively *via* Asa Tools Sdn Bhd to company Consecutive System.

[88] It was also mentioned that company Asa Tools (M) Sdn Bhd is the official representative and responsible for handling Mapal products in Malaysia. In other words, the second defendant remained the exclusive agent/dealer of the first defendant's Mapal products and not the plaintiff.

[89] The plaintiff's claims had at all material times revolved around the arranged agreement as laid out in the correspondences exchanged between the parties, which are marked as exhs. P4, P5, P6, P7, P8, P9 and P10.

[90] Based on the evidence, in the entire context of this case, my conclusion is that there was no contract/exclusive distributor exists between the plaintiff with the second defendant and/or the first defendant.

[91] It is my finding that the plaintiff's position falls back to what has been stated in exh. P4 dated 27 April 2000 and P5 dated 29 April 2000 that the plaintiff was appointed as first defendant's exclusive consultant at Proton Motor Co. The plaintiff will be paid commission for each project separately, depending on the actual net sales price less the charges incurred for shipment and packing. The plaintiff will receive a complete Mapal catalogue so that they will be able to represent the first and the second defendant at Proton.

[92] In the circumstances the issue whether the first and second defendants had breached the contract does not arise.

Whether The Third Defendant's Incorporation Was Merely As An Alter Ego Of The First And Second Defendants

[93] The plaintiff had submitted that sometime in 2007, the third defendant was incorporated, whereby the third defendant then began selling and supplying the first defendant's products to Proton.

[94] The defendants claim that the third defendant is not bound by the agreement and thus should not be held liable to the plaintiff for selling the first defendant's products to Proton.

[95] It was further submitted that the third defendant's shareholders consisted of the first defendant, Mr Lim Chooi Teck ("SD3"), Mr Lim Kang Hum, and Mr Andrew Ng Suh Thiam ("SD5"). SD3, SD5 and Mr Lim Kang Hum were at all material times the shareholders of the second defendant.

[96] The defendant's witnesses allege that the first and second defendants had always intended to incorporate a local body for the first defendant. The plaintiff denied this contention and contended that it was clearly a move by the first and second defendants to obviate legal obligations and in incorporating the third defendant, SD3 and Mr Lim Khang Hum would stand to gain better commission from the sales to Proton as opposed to the initial arrangement, as the plaintiff would no longer gain commission.

[97] Thus, it was submitted that the third defendant was incorporated with the malicious intent not only to eliminate the plaintiff from the relationship with Proton, but also as a way for the first and second defendants to obviate the legal obligations from the earlier agreements.

[98] The plaintiff made up his case by saying that on or around March 2005, the first and second defendants had, without the plaintiff's knowledge, met with some representatives from Proton's purchasing department. The first and second defendants allege that the meeting was initiated by Proton, to discuss *inter alia*, the alleged high prices set by the plaintiff for the cutting tools.

[99] The second defendant had informed this court that during this meeting, they had informed Proton of the fact that they were the first defendant's sole agent in Malaysia, which allegedly prompted Proton to inquire on purchasing directly from the first and second defendants.

[100] The plaintiff submitted that this meeting in and of itself, was a direct contravention of the agreement between the parties, whereby it had been agreed upon that the plaintiff was to deal with Proton particularly in respect of matters regarding inquiries and purchasing.

[101] The fact that this meeting was held without the plaintiff's knowledge shows that the first and second defendants had dubious intentions meeting with Proton's purchasing department despite knowing the plaintiff was primarily responsible in dealing with Proton.

[102] It was submitted that the first and second defendants allegation that the said meeting was initiated by Proton was not only unfounded and unproven, it is also irrelevant as the first and second defendants were wholly aware that the issue of pricing ought to have been discussed with the plaintiff yet neither of them corrected Proton or attempted to inform the plaintiff.

[103] It was submitted that the act of the second defendant in presenting the letter of appointment from the first defendant as exclusive agent in Malaysia, and also by offering to sell the first defendant's tools at a lower price to Proton, as detailed in the minutes of meeting dated 1 April 2005, was clearly calculated to influence Proton's purchasing department to purchase the said tools from the second defendant instead of from the plaintiff.

[104] It was further submitted that the mere fact that the second defendant had even presented the said letter of appointment to Proton during a meeting in which the second defendant was supposed to only provide technical support, is a clear indicator of the second defendant's malicious intention to encroach on the plaintiff's economic relationship with Proton, and to ultimately eliminate the plaintiff altogether.

[105] The defendants allege through their witnesses' testimony that Proton had complained of high prices of the first defendant's tools as sold by the plaintiff. The plaintiff submitted that such allegation is unfounded and uncorroborated, as none of the witnesses from Proton (save for SD1) ever mentioned of any complaints, whether of high prices or anything else.

[106] The plaintiff quoted SP5, evidence during examination in chief and cross-examination:

> PP: Were you aware as a procurement officer of any complaint at this date any complaint either in verbal or written regarding the conduct or performance of Consecutive Systems Sdn Bhd in Proton?

SP5: Dalam 2003-2005 tiada complaints. A

PD: On the issue on complaints when the Defendant solicitor asked "Apakah services yang dinyatakan oleh En Alias?"

SP5: Dari segi teknikal dan kualiti tiada komplen dari end user dan dari segi penghantaran lambat juga tiada komplen dari end user. B

[107] Further, it is contended that the plaintiff themselves had never received any negative feedback from Proton pertaining to the prices of the first defendant's products. Thus, it was submitted that the defendants' allegation of complaints by Proton is a mere afterthought in an attempt to justify their actions in meeting with Proton. C

[108] The plaintiff further submitted that by virtue of the fact that the first and second defendants had met with Proton and offering to sell and supply the first defendant's tools to Proton directly while disregarding the plaintiff is a breach of the agreement between the parties. D

[109] Finally it was submitted that the second defendant's act of withholding the price list for the second cylinder head line machining products from the plaintiff was clearly breaching the agreement between the parties, as well as displaying the second defendant's malicious intent to encroach on the plaintiff's economic relationship with Proton. E

[110] First with regards to the incorporation of the third defendant, my view is, it is validly incorporated under the law and whether the third defendant consisted of the first defendant, Mr Lim Chooi Teck ("SD3"), Mr Lim Kang Hum, and Mr Andrew Ng Suh Thiam ("SD5"). SD3, SD5 and Mr Lim Kang Hum were at all material times the shareholders of the second defendant do not matter. F

[111] I do not agree with the contention of the plaintiff that the third defendant was incorporated with the malicious intent not only to eliminate the plaintiff from the relationship with Proton, but also as a way for the first and second defendants to obviate the legal obligations from the earlier agreements. G

[112] The third defendant is separate legal entity. I have found it difficult to comprehend how the incorporation of the third defendant was to eliminate the plaintiff. The only reason given by the plaintiff is by way of lifting the cooperate veil of the company and saw the directors are consisted of the first and second defendant therefore the incorporation is a way for the first and second defendants to obviate the legal obligations from the earlier agreements. I think this should not be allowed. H I

[113] In *Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor* [2011] 1 CLJ 491; [2011] 1 MLJ 752, the Court of Appeal has said, in regard to the lifting of the veil of incorporation, Slade LJ approached it in this way (see p. 1026 of the report):

> Whether or not such a course deserves moral approval, there was nothing illegal as such in Cape arranging its affairs (whether by the use of subsidiaries or otherwise) so as to attract the minimum publicity to its involvement in the sale of Cape asbestos in the United States. As to condition (iii), we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. Mr Morison urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the group's asbestos trade in the United States without the risks of tortious liability. This may be so. However, in our judgment, Cape was in law entitled to organise the group's affairs in that manner and (save in the case of AMC to which special considerations apply) to expect that the court would apply the principle of *Aron Salomon (Pauper) v. A Salomon and Company Limited* [1897] AC 22; [1895-99] All ER Rep 33 in the ordinary way.
>
> [29] It is the registrar of companies who, under s. 16 of the Companies Act 1965, is authorized to register a company and based on the memorandum and articles of the company, the registrar of companies will issue a certificate of the company's incorporation. According to the case of *Tan Lai v. Mohamed bin Mahmud & Ors* [1982] 1 MLJ 338, the effect of these acts by the registrar of companies would create a 'body corporate' capable forthwith of exercising the functions of an incorporated company. To put it differently, from the date of incorporation as specified in the certificate of incorporation, the subscribers to the memorandum together with such other persons as may from time to time become members, the company will be a body corporate based on the name as contained in the memorandum.

[114] In *Win Line (UK) Ltd v. Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98, it was said that "The court would pierce the corporate veil where the corporate structure was merely a device, façade or sham. It was appropriate to pierce the corporate veil where special circumstances existed indicating that it was a mere façade concealing the true facts."

[115] The plaintiff's contention therefore is without merit and proper basis. Firstly, the plaintiff cannot prove the third defendant company as a separate legal entity by itself has the malicious intent against the plaintiff. Secondly, even if the first defendant and the second defendant dealing with Proton is trying to obviate the legal obligations from the earlier agreements, therefore, they have malicious intent to encroach on the plaintiff's economic relationship with Proton; it is nothing to do with the third defendant company.

[116] I am of the opinion that the fact that there was a meeting held between second defendant and Proton and without the knowledge of plaintiff does not constitute malicious intent on the part of the second defendant.

[117] I am also of the opinion that the fact that the second defendant in presenting the letter of appointment from the first defendant as exclusive agent in Malaysia, and also by offering to sell the first defendant's tools at a lower price to Proton, as detailed in the minutes of meeting dated 1 April 2005, and had also presented the said letter of appointment to Proton during a meeting in which the second defendant was supposed to only provide technical support are insufficient grounds to establish malicious intent of the part of second defendant.

[118] The plaintiff's reliance on the evidence of SP5 during examination in chief and cross-examination also to my opinion is insufficient ground to show malicious intent because SP5 who, is the QC Engineer, Proton ETM Shah Alam was not present during the meeting and his evidence is also not relevant because his answer is clearly with regard to the conduct or performance of Consecutive Systems Sdn Bhd in Proton in respect of technical and quality of products not directly on the pricing of first defendant's tools which was the subject matter of the meeting. Although SP4, section head purchasing dept at the material time, who attended the meeting was called as witness, there was no questions asked whether what was stated in the minutes of meeting (D52) is true.

[119] It is my considered view that Proton as the end user of the first defendant products is not bound by the plaintiff. Proton has the right to enquire on the origin and the price of the products and after sales service. As the sole agent to the first defendant products and provider after sales service to Proton, it is prudent for the second defendant to explain to Proton regarding their position. In that meeting as appears in D52, Proton who had the impression that company Consecutive System (Abu Yazed) is the exclusive agent for Mapal in Malaysia and it is Proton who orders their purchaser to send all Mapal enquiries to Asa Tools Sdn Bhd with immediate effect. This is

confirmed in exh. P27 dated 13 April 2005 by first defendant to the plaintiff that first defendant cannot refuse to accept the requests of their customer and this was initiated by Proton and that first defendant had to accept Proton's requirement.

[120] I find there is nothing wrong with Proton's action. There is no supply or distribution agreement between Proton and plaintiff to bind them. Proton as the end user has every right to choose its distributor or buy products from any company they like.

[121] In conclusion, my finding is that the third defendant's incorporation does not prove malicious intent on the part of the first and the second defendant.

Whether The Plaintiff Is Entitled To RM8,355,021.54 In Loss Of Profits, And Euro 109,500 As Outstanding Commissions

Loss Of Profits

[122] Section 74(1) of the Contracts Act 1950 (Act 136) provides:

> When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> 74(2) - Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

[123] In *Hadley v. Baxendale* [1843-60] All ER 461-466 it says:

> When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably considered either arising naturally, ie, according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at times they made the contract, as the probable result of the breach of it ...

[124] The statutory enunciation of the rule in *Hadley v. Baxendale* (1854) 9 Exch 341 is found in s. 74 of the Contracts Act 1950. See *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Sdn Bhd* [2010] 1 LNS 206; [2010] 1 MLJ 329.

[125] I have found that there was no contract/exclusive distributor exists between the plaintiff with the second defendant and/or the first defendant and there is no breach of contract.

[126] It follows that, the issue whether the plaintiff is entitled to special damages, exemplary damages or aggravated damages and loss of profit does not arise. Section 74 of the Contract Act 1950 and the principle in *Hadley v. Baxendale* does not apply. The prayer for specific performance is also not maintainable.

Outstanding Commission

[127] I agree with the plaintiff counsel submission that at all material time, the first defendant had agreed and promised to pay to the plaintiff as executive consultant certain commission for the sales of the first defendant's products.

[128] The first defendant's correspondences to the plaintiff, whereby the first defendant had stated in their letter dated 27 April 2000:

> You act as our exclusive consultant at Proton Motors Co, which will be confirmed separately in a special agreement. Your commission will be determined for each project separately, depending on the actual net sales prices less the charges incurred for shipment and packing.

[129] I have dealt with the contents of the letter dated 6 August 2001 which talks about the future conduct of business and the proposals. The plaintiff had abandoned the agreement on the proposals and there was no agreement to bind parties. I have also concluded that what is not disputed and left to be the accepted role of the plaintiff is that the plaintiff will be responsible for liaising with personnel from Proton with regards to future receiving of orders and follow up support. Therefore the plaintiff position as executive consultant being paid on commission basis depending on the net sales of the first defendant's product sold to Proton remain valid and enforceable.

[130] Based on the evidence, my conclusion is that the plaintiff as an executive consultant is entitled to be paid the commission as promised by the first defendant.

[131] This is further detailed in the first defendant's email to the plaintiff dated 28 January 2004, whereby SD1 had laid out the following rates for the plaintiff's commission in respect of the second cylinder head line machining:

Amount of order:	Commission %
Euro 250,000	5%
Euro 500,000	6%
More than Euro 750,000.00	10%

[132] For the sales of the first defendant's products for the first cylinder head line machining ("Danobat project"), the first defendant had not specified the plaintiff's commission for the said project.

[133] The commission arrangement was explained by the plaintiff's witness, SP6, as follows:

> PP : Could you explain how your commission arrangement with MAPAL as their consultant if you are successful in securing MAPAL (first defendant) product into Proton projects.
>
> SP6 : As a consultant to MAPAL (first defendant) the objectives is to promote and achieve the inclusion of MAPAL products into any machining project in Proton. Plaintiff and MAPAL is aware that if plaintiff is successful in recommending MAPAL product and if included by Proton for a machining project there will be a direct sales to MAPAL by virtue that the turnkey contractor appointed by Proton are normally from outside MALAYSIA.
>
> The direct purchase to Mapal (first defendant) from turnkey contractors for Proton will result in direct sales revenue to Mapal through plaintiffs' effort in introducing, promoting, protecting the good name, and finally securing the inclusion of Mapal product into the machining projects. As a result the profit accrued from the sales they will pay the commission to plaintiff.
>
> Consequently plaintiff as an exclusive consultant expect and was offered commission by Mapal as a consequen of direct sales to Mapal from turnkey contractor during project phase: and this was consented by Asa Tool their sole agent in Malaysia. (I refer to p. 1, bundle B1, ikatan dokumen bersama).
>
> Hence Mapal pays commission to plaintiff on the sales of Mapal product that Mapal gets directly from Proton or from Proton appointed contractors based on the project. Mapal will determine the percentage of commission with plaintiff.
>
> In the case of the first cylinder head project, Mapal did not specify the commission percentage to plaintiff while for the second cylinder head project, Mapal specified percentage commission based on the amount of the order received by Mapal.

[134] At para. 49 of the plaintiff's statement of claim, it was alleged that the first defendant had received orders amounting to the value of EUR 1,495,000 from Makino Japan. Therefore the amount of commission supposed to be paid to the plaintiff is EUR 1,495,000 and not EUR 40,000 ie, the commission that has not been paid for the

second cylinder head line machining which the first defendant promised to pay based on the percentage in the letter dated 28 January 2004. The plaintiff was only paid commission of EUR 40,000 on 31 May 2001 after the first defendant terminated the appointment of plaintiff as exclusive consultant on 13 May 2005. The percentage promised by the first defendant for values of sales exceed EUR 750,000 is 10%. Therefore the expected commission to be paid to the plaintiff is EUR 109,500 after taking account the commission of EUR 40,000 which has been paid to the plaintiff (EUR 149,500-EUR 40,000).

[135] It was also an agreed fact that the first defendant had paid to the plaintiff EUR 40,000 as commission for the second cylinder head line project, which SP6 in his witness statement said as follows:

PP : Were you paid according to the letter dated 28 January 2004 for the second cylinder head project involving MAKINO JAPAN?

SP6 : No, MAPAL (first defendant) only paid EURO 40,000 while I believe MAPAL received orders from MAKINO up to EURO 1.5 mil.

PP : When did plaintiff received the commission of EURO 40,000 from MAPAL?

SP6 : It was telegraphic transferred to plaintiff account in May 2005 after they terminated plaintiff on 13 April 2005.

[136] This was further agreed by SD2 in their testimony during cross-examination, as follows:

PP : MAPAL has promise to pay commission base on p. 19?

SD2 : Yes, sure it is written there.

PP : As per this letter have you complied paying the commission with Mr Abu?

SD2 : I paid 40,000.

[137] However, plaintiff's counsel in her submission in reply submit that, based on the plaintiff's witnesses' testimonies, the plaintiff is entitled to more than the EUR 40,000 commission.

[138] This can be seen in the testimony of SP3, as follows:

PP : Can you tell the court the propose amount in Japanese Yen and Ringgit given by MAKINO the turnkey contractor for the cutting tooling systems?

SP3 : Untuk MAPAL Uniset V, satu juta Ringgit Malaysia dan cutting tool systems lapan juta Ringgit Malaysia.

PP : Where did you get this figure?

SP3 : Dari MAKINO J.

[139] During the cross-examination by the defendants' counsel, SP3 elaborated further, as follows:

PD : Bagaimana En. Kamarudin mendapatkan dari MAKINO?

SP3 : Sebelum mesin dibenarkan masuk di Malaysia, pihak logistic berurusan dengan pihak kastam dan kastam meminta supaya pihak MAKINO menyediakan satu dokumen untuk declare setiap mesin, harga mesin, harga pre-setting, harga tool dan lain-lain, sebab dengan dokumen tersebut Proton akan apply exemption. Secara tidak langsung logistic meminta khidmat saya mendapatkan costing tersebut.

PD : Kamu pernah nampak dokumen tersebut?

SP3 : Saya terima dokumen tersebut dan serahkan kepada pihak logistic.

[140] The document referred to by SP3 was a document from Makino to Proton, which had been marked as exh. P3.

[141] This document was further referred to by SP6 in determining the commission owing to the plaintiff, in his testimony as follows:

PP : What was the commission MAPAL, first defendant should have paid plaintiff?

SP6 : See P3, MAKINO document on costing for second cylinder head line. I based my calculation on the breakdown per the annexed in P3. Item 2.8 description presetting tool gauge cost breakdown 1.047 million Ringgit; item 4.2, cutting tools including spares, cost breakdown 8.724 million ringgit. These 2 items amount to 9.712 million ringgit. Conversion rate of 4.6 ringgit per euro equals 2.124 million euro, and 10% of this is 212,000 euro (10% commission based on P15), minus the 40,000 euro already paid, the balance to be paid is 172,000 euro.

[142] As it was never disputed that the plaintiff was wholly responsible in securing the second cylinder head line project, the plaintiff is thus clearly entitled to the commission as promised by the first defendant in exh. P15.

[143] Based on the above, my view is that the outstanding commission for the second cylinder head line project as promised by the first defendant to the plaintiff is clearly due and owing.

[144] The correctness of the purchase orders and percentage of the commission agreed in the letter dated 28 January 2004 was never challenged by the first defendant. On the balance of probabilities, the plaintiff has proved his case on the issue of commission, therefore, is entitled to recover EUR 172,000 instead of EUR 109,500 as commission promised by the first defendant.

[145] I reminded myself that at para. 49 of the plaintiff's statement of claim, it was alleged that EUR 109,500 as commission promised by the first defendant. However the allegation was made before proof of actual commission in court. Since the plaintiff had successfully proved the actual commission and the court is satisfied with the evidence before it, therefore, the commission of EUR 172,000 is the commission due and owing to the plaintiff. In any event O. 92 r. 4 of the Rules of Court 2012 allows the court in its inherent powers to make any order as may be necessary to prevent injustice.

[146] For the sales of the first defendant's products for the first cylinder head line machining ("Danobat project"), the first defendant had not specified the plaintiff's commission for the said project. The plaintiff is also entitled to recover the commission for Danobat project. The commission should be based on the percentage computed in the letter dated 28 January 2004. In order to determine the commission to be paid to the plaintiff, an account of the actual net sales prices less the charges incurred for shipment and packing for this project must be taken.

Conclusion

[147] In conclusion, plaintiff's claim is hereby allowed against the first defendant:

(i) The commission for the second cylinder head line machining of EUR 172,000;

(ii) The commission for the first cylinder head line machining to be assessed;

(iii) An account of the actual net sales prices less the charges incurred for shipment and packing for first cylinder head line machining must be taken to determine the commission;

(iv) Interest; and

(v) Cost RM30,000.